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Race-Based Legislative Gerrymandering: Have We Really Gone Too Far;Note

Christopher Kukla

RACE-BASED LEGISLATIVE GERRYMANDERING: HAVE WE REALLY GONE TOO FAR?

I. INTRODUCTION

The current crop of Supreme Court decisions on the use of race in legislative redistricting has created many questions and issues that will shape the process of redistricting for years to come. This Note will identify the predominant issues raised by these decisions and decide what the proper role of the judiciary is in this area of the law. The first part of this Note will discuss the substantive provisions of the Voting Rights Act as they relate to recent important cases. The second part will provide a synopsis of the recent cases in this field. The third part will summarize the action taken by the states affected by the current litigation. Lastly, this note will provide conclusions and recommendations in light of current voting rights theory.

II. THE VOTING RIGHTS ACT OF 1965: WHERE IT ALL BEGAN

The Voting Rights Act of 1965[1] was enacted in order to prohibit Southern states from effectively blocking their black populations from being able to vote. In the cases that the Supreme Court has recently decided, sections 2 and 5 of the Voting Rights Act have been under intense scrutiny. It is important, then, to be familiar with the basic provisions of Sections 2 and 5 before examining the relevant cases.

Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees . . . as provided in subsection (b) of this section.
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in 42 U.S.C. §§1971-1973gg (1994)). This note only focuses on the substantive provisions applicable to the cases cited within. For further discussion of the history of the Act, both procedural and legislative, *see* Scott Gluck, Note, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337 (1996). For an in depth look at the nature of voting rights claims today, *see* Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237 (1993).

of a protected class elected in numbers equal to their proportion in the population.[2]

As the Act was enacted originally, this section proposed only a purpose test: for a plaintiff to prove a Section 2 violation, he or she had to prove that the intent of the state legislature was to draw district lines based on race. In *City of Mobile v. Bolden*,[3] the Supreme Court held that Section 2 was no different than the Fifteenth Amendment, and as such, proof of intent was necessary to make a valid claim. In 1982, Congress amended Section 2 to read as it is above. Essentially, the amendments added a results prong to the Act. The "totality of the circumstances" test was defined in *Thornburg v. Gingles*,[4] in which the Supreme Court established the necessary elements for a claim under the results prong of amended Section 2. Those elements are: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the minority group must prove that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[5] Because the purpose prong is almost impossible to satisfy, most litigation arises from the results prong of Section 2.[6]

Section 5 of the Voting Rights Act reads as follows:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, prac-

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2. 42 U.S.C. §1973b(a)-(b) (1994) [emphasis in original].
3. 446 U.S. 55 (1980).
4. 478 U.S. 30 (1986).
5. *Id.* at 50-1.
6. *See generally* Jennifer L. Gilg, Note, *Back to the Drawing Board: Equal Protection Clashes with the Voting Rights Act in* Shaw v. Reno, *113 S.Ct. 2816 (1993)*, 73 NEB. L. REV. 383, 389-93 (1994).

> tice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure . . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.[7]

In essence, Section 5 is the "preclearance" provision of the Voting Rights Act. Under 42 U.S.C. § 1973b(b), the Attorney General may determine that certain counties are covered jurisdictions because of past discrimination; then, the state has to submit any change to their districting plan for preclearance[8] by the Attorney General. The state has the alternative of petitioning for a declaratory judgment from the District Court for the District of Columbia in lieu of getting preclearance from the Attorney General.

The Supreme Court, in *Beer v. United States,*[9] interpreted Section 5 to apply to redistricting that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[10] The retrogression principle of *Beer* has become the driving principle behind several states' redistricting plans and has become the center of debate when the Court attempts to determine if a particular redistricting plan went beyond what was necessary under Section 5.

III. *SHAW V. RENO*: NEW RULES

After the 1990 census, North Carolina became entitled to a twelfth seat in the House of Representatives. As a result, the General Assembly of North Carolina passed a new legislative districting plan that included one black-majority district. However, forty of North Carolina's counties fell under the jurisdiction of Section 5 of the Voting Rights Act, forcing the state to send the plan to the Attorney General for preclearance.[11] The Attorney General objected to the plan, arguing that the state could have made provisions for two black-majority districts. Pursuant to the Attorney General's recommendations, the North Carolina General Assembly passed a second redistricting plan creating two black-majority districts. The Attorney General did not object to the new plan. Shortly thereafter, this suit was filed, alleging that the plan constituted an improper racial gerrymander.[12]

The minority districts created by the revised plan, the First and the Twelfth, were

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7. 42 U.S.C. § 1973c (1994) [emphasis in original].

8. The preclearance process is not necessarily an affirmative process, but is instead one of a lack of opposition. The Attorney General does not have to affirmatively accept a plan for it to be precleared, but must file an objection if the plan does not pass the agency's approval. In that way, the Attorney General does not accept plans, but only objects to them, if at all.

9. 425 U.S. 130 (1976).

10. *Id.* at 141.

11. Shaw v. Reno, 509 U.S. 630, 634 (1993) (hereinafter *Shaw I*).

12. *Id.* at 634-35.

both irregular in shape. The First District was located primarily in the northeast portion of the state, but hooked down in a narrow band into the southern portion of the state, almost to the South Carolina border.[13]

The Twelfth District is described as such:

> [A]pproximately 160 miles long, and, for much of its length, no wider than the I-85 corridor . . . . Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point, the district remains contiguous only because it intersects at a single point with two other districts before crossing over them.[14]

The plaintiffs maintained that the districts were drawn with the sole purpose of creating black-majority districts, and that the General Assembly disregarded traditional divisional boundaries, thus engaging in an impermissible racial gerrymander prohibited by the Fourteenth Amendment.

More specifically, the suit alleged that the districts were drawn to ensure that two black representatives would be elected in the new districts. The special judicial panel had dismissed the appellants' claims.[15] The essential holding in the case was two-fold. The three-judge panel first held that districting by race is permissible only to the extent that it does not dilute white voting strength using the "one-person, one-vote" principle.[16] The panel stated that the plan did not lead to a disproportionately low representation of white voters. Second, the panel held that because the General Assembly intended to comply with the Voting Rights Act, the legislature acted constitutionally.[17]

The Supreme Court had two issues to decide: whether this was a vote dilution case, and whether this redistricting plan was warranted under the Voting Rights Act. The majority of the Court, speaking through Justice O'Connor, first emphasized the distinction between this case and the earlier vote-dilution. The plaintiffs in this case, according to O'Connor, brought a claim alleging that the districts were drawn in such an irregular fashion that they could only have been drawn "as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[18] The Court held that this was indeed a question of an impermissible racial gerrymander, under the Equal Protection Clause, and therefore constituted a claim upon which relief could be granted.[19]

From this, the Court began its' analysis of the North Carolina redistricting plan under the Equal Protection Clause. The Court held that redistricting legislation "so bizarre on its face that it is 'unexplainable on grounds other than race,' demands the

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13. *Id.* at 635.
14. *Id.* at 635-36.
15. Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992).
16. *Shaw I,* 509 U.S. at 638. The case relied upon by the three-judge panel was *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977) (hereinafter *UJO*). That case was similar in that it dealt with a redistricting plan that included new majority-minority districts after the Attorney General recommended the state do so. The Court held that the plan was legal and did not dilute white voting strength. This is in contrast to the claims of the plaintiffs in this case that the districts were drawn in a bizarre fashion with race as their only determinant factor. Ultimately, *UJO* established the "one person-one vote" principle, which states that each person is guaranteed the right to cast a meaningful ballot under the law.
17. *Shaw,* 808 F.Supp. 461.
18. *Shaw I,* 509 U.S. at 642.
19. *Id.*

same close scrutiny that we give other state laws that classify citizens by race."[20] By this, the Court determined that racial reapportionment plans must pass strict scrutiny to be considered constitutional; the plan must be narrowly tailored to further a compelling governmental interest. Further, the Court held that redistricting plans drawn with the sole purpose of separating voters by race must be examined under strict scrutiny regardless of the reasons or motivations for enacting the plan.[21]

There are two rules to be taken from the majority holding. First, the Court demands that districts be drawn according to traditional districting principles: "compactness, contiguity, and respect for political subdivisions."[22] Second, the Court provides that a plaintiff challenging a redistricting plan under the Equal Protection Clause state his or her claim in this manner:

> [B]y alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and the separation lacks sufficient justification.[23]

The Court, by enacting these standards, stated that race cannot be the compelling factor in drawing district lines and that shape is a primary determinant in elevating the plan to strict scrutiny analysis.

The Court proffered several reasons for their main holding. First, the Court said that racial gerrymandering assumes that all members of a racial group are going to vote for the same candidates. The Court argued that such a separation of voters is racial segregation, something that the Fourteenth Amendment was enacted to combat. Furthermore, the Court stated that legislators elected from those districts would feel obligated to represent the predominant racial group in the district and not the constituency as a whole, because of the emphasis placed on that group by creating a district for them. By this, the Court professed the belief that voting systems must be created in a color-blind fashion so as not to give any racial group greater or lesser effect on the election of representatives to government.[24]

The state had argued that there was a compelling interest in drawing two black-majority districts in order to bring the redistricting plan into compliance with the Voting Rights Act. The Court explained that there is indeed a compelling state interest in following laws that are both constitutional in their interpretation and their application. However, O'Connor drew a distinction between what the law allows and what the law requires. In this case, O'Connor deferred to the rule that the Court expressed in *Beer*.[25] O'Connor explained that *Beer* held that a narrowly tailored redistricting plan will only do that which reasonably avoids retrogression. If a state goes beyond what a court considers to be reasonable, the plan is unconstitutional. Further, a state enacting a redistricting plan pursuant to the Attorney General's recommendations can still have the plan ruled unconstitutional if it goes farther than what is reasonable to avoid retrogression. The Court held that this is consistent with the strict scrutiny standard.

North Carolina also defended their plan as a protection against the dilution of

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20. *Id.* at 644 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).
21. *Id.* at 645.
22. *Id.* at 647.
23. *Id.* at 649.
24. *Id.*
25. *See* note 8, *supra*, and accompanying text.

black voting strength, preventing a Section 2 violation, as the state construed the *Gingles* test.[26] The Court rejected this argument, holding that the group in question is too disperse to satisfy the first part of the *Gingles* test, and that fear of a Section 2 violation was not a legitimate factor in drawing districts. The Supreme Court sent the case back to the judicial panel on remand, holding that there was a cognizable claim under the Fourteenth Amendment, and ordered the panel to apply strict scrutiny to the plan. The Court, however, did not address the issue of whether Sections 2 and 5 of the Voting Rights Act are constitutional; it simply stated that the question at hand was the level of constitutional scrutiny required of racial redistricting plans.

Justice White, in his dissent, stated that until the *Shaw I* opinion, there had only been two kinds of state voting practices that were allowed to rise to the level of a constitutional claim. The first was a "direct and outright deprivation" of the right to vote.[27] The second was vote dilution.[28] White argued that the claim at issue in this case was essentially vote dilution. What White saw as the issue here was whether the newly drawn districts took power away from white voters to participate in the voting process. Justice White believed that the case should have been resolved by simple application of the *UJO* one person-one vote doctrine.

White also argued that the new criteria laid out by the majority will have an adverse impact on the future of districting with race as a factor. He posited that while bizarrely drawn districts may point to a potential racial gerrymander, "they do no more than that."[29] This meant, according to Justice White, that state legislatures will have to draw compact and contiguous districts when attempting to maximize minority participation, even if the potentially bizarre shape of the proposed district is the product of another concern, such as incumbency protection.[30] Justice White argued that the North Carolina plan was narrowly tailored to meet the Attorney General's objection to the plan, and to protect several state interests, like protection of incumbents and compromise between state political players.[31] By maintaining that a plan may be narrowly tailored as a response to a prior objection by the Attorney General, Justice White said, in effect, that the Attorney General has the power to determine that minority participation in the electoral process needs to be increased under the Voting Rights Act.

Justice Souter, in his dissent, followed a different path than did Justice White. Justice Souter argued that the majority was wrong to place voting rights cases on the same constitutional plane as other equal protection claims involving governmental conduct. He posited first that districting must bear race in mind, especially in a racially-mixed area.[32] Second, he argued that other cases involving governmental conduct usually involve a scenario where using race to benefit one group necessarily was to the detriment of another.[33] Souter posited that drawing districts to increase minority participation does not, in most cases, harm the majority in the state. He stated that voting rights cases should not be subject to the same level of constitutional scrutiny to which

26. *See* note 5, *supra*, and accompanying text.
27. *Shaw I*, 509 U.S. 630, 659.
28. *Id.*
29. *Id.* at 672.
30. *Id.* at 673.
31. *Id.* at 674.
32. *Id.* at 680.
33. *Id.* at 681.

other state actions is and should be subject.[34]

Simply stated, Souter's position is this: in redistricting cases, an intermediate level of scrutiny should be applied. Voting rights claims with a cognizable injury fall into one of two categories: vote dilution or vote abridgement (the same categories as applied by Justice White). If the redistricting plan falls into one or the other, then the plan must pass constitutional scrutiny.[35] If not, then it should be considered a "benign" discriminatory practice in pursuit of some legitimate governmental purpose, and allowed.

IV. *SHAW V. HUNT*: THE REMAND

In August, 1994, the special judicial panel handed down their decision in the remand of the *Shaw v. Reno* decision. *Shaw v. Hunt*[36] was an 88 page opinion, written by Judge Phillips, which upheld the North Carolina redistricting plan of 1992. The panel ruled that the redistricting plan was narrowly tailored to further a compelling state interest, thus holding that the plan passed the strict scrutiny analysis ordered by the Supreme Court.

A. Procedural History and Background

The panel first summarized the procedural and factual details of the case. The panel reiterated its holding from Shaw *v. Hunt*: that the plaintiffs had not made a cognizable claim against the state because the plaintiffs had not suffered a cognizable injury.[37] The panel stated that the only issue to be decided on remand was whether the plaintiff's claim that the redistricting plan was a racial gerrymander in violation of the Equal Protection Clause was valid.[38] Upon remand, the state defendants amended their response, stating that one of the reasons the state drew the revised plan was to respond to the Attorney General's objections, and the state created two majority-minority districts as the Attorney General suggested. The state further contended in their amended response that the plan was not a racial gerrymander because it integrated districts and drew the district lines based on legitimate districting principles: incumbent protection, one person-one vote restrictions, and the creation of districts that shared common economic and social values.[39]

B. General Legal Principles

In this section of the opinion, Judge Phillips gave a four-part analysis of the Equal Protection Claim to be decided on remand.

1. General Nature of the Claim

Judge Phillips stated that the plaintiffs' initial Equal Protection claim was a bifurcated one. First, the plaintiffs alleged that districts drawn with race as the predominant factor violated the Equal Protection Clause, regardless of justification. Second, the plaintiffs alleged that, even if race-based redistricting is not per se unconstitutional,

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34. *Id.*
35. *Id.* at 683-85.
36. 861 F. Supp. 408 (E.D.N.C. 1994) (hereinafter *Shaw II*).
37. *Id.* at 419.
38. *Id.* at 420.
39. *Id.*

this particular plan was unconstitutional because it did not rely on traditional districting principles.[40] The second claim was that which the plaintiffs pursued on remand.

Judge Phillips recognized only two previous claims to voting rights violation under Equal Protection: a claim that a redistricting plan violated the one person-one vote doctrine, or that a redistricting plan diluted the voting strength of a minority group.[41] Two points were made: 1) until *Shaw I*, the Supreme Court had never held a redistricting plan that did not cause a cognizable injury to the plaintiffs, and 2) *UJO* held that states could draw districts based on race to comply with the Voting Rights Act, as long as they did not dilute voting strength or preclude any racial minority from participating in the electoral process.[42] They interpreted *Shaw I* as providing a third claim, when a state segregates voters into districts based on race without "sufficient justification."[43]

If that was the nature of the claim, the panel said, then there are certain problems in application of the general Equal Protection model to the specialized facts of voting rights claims. Specifically, the panel pointed out these: "the problem of standing; the nature of the showing required to trigger strict scrutiny; the allocation of the burden of proof at the strict scrutiny stage; the types of compelling state interests that might justify such race-based action, and the meaning of narrowly tailored in this context."[44] The panel dealt with each of these issues separately.

2. Standing

While the defendants argued that the plaintiffs had no standing to assert a claim because of the lack of an identifiable injury to white voters, the panel disagreed. Judge Phillips interpreted the *Shaw I* opinion as granting standing to white voters on the basis that the injury in fact is the characterization of voters as part of a racial class instead of as individuals. Thus, any registered voter in a jurisdiction that has enacted a racial redistricting plan, whether the voter lives in one of the affected districts or not, has standing to sue.[45]

3. Proof Required to Trigger Strict Scrutiny

The panel's interpretation of the *Shaw I* decision led it to hold that strict scrutiny is triggered in redistricting cases when there is proof that race was a motivating factor in drawing new districts, whether by concessions by the state of the use of race, the bizarre shape of districts, or other determinant factors of racial intent as set down by the Supreme Court. This means, in Judge Phillips's view, that strict scrutiny is used when race is the predominant factor, even if it can be shown that the exact shape and placement of the district was ultimately decided by other factors.[46] North Carolina had argued that *Shaw I* would require all redistricting plans to undergo the strict scrutiny analysis, because it is always possible to show that a state was considering the racial impact of redistricting plans to some degree.[47] The panel countered stating that mere

40. *Id.* at 421.
41. *Id.* at 421-22.
42. *Id.*
43. *Id.* at 422 (quoting *Shaw I*, 509 U.S. at 649 (1993) (citation omitted)).
44. *Id.* at 423.
45. *Id.* at 426-27. The standing issue is dealt with in *Hays v. Louisiana* discussed *infra*.
46. *Id.* at 431.
47. *Id.* at 433.

knowledge would not trigger strict scrutiny. Taking "race-conscious" action is different from taking "race-based" action, and the Supreme Court exacts strict scrutiny analysis on the latter, but not the former.[48] Therefore, states could keep race in mind while drawing districts without constitutional infirmity, but must be acting upon other legitimate districting principles.

In a footnote, the majority identified two instances in which strict scrutiny will be consistently triggered. The first instance is that in which the plan draws more majority-minority districts than the plan before it had, and that it was drawn either in response to a private suit or an objection by the Attorney General. The second instance is cases in which a particular racial group is concentrated in numbers larger than their proportionate percentage of the population as a whole, and the shape of the districts is so irregular that it can be inferred that race was the predominant factor. Otherwise, the panel held that strict scrutiny is difficult to trigger because districts that do not fall into these two categories are drawn pursuant to other factors, with race only being a component of the whole decision-making process.[49]

4. Application of the Strict Scrutiny Standard in the Redistricting Context

Due to certain differences between voting rights cases and racial preferences cases in, for instance, hiring or granting government contracts, the panel pointed out that there are inherent difficulties in applying the strict scrutiny standard to the unique situation arising in the voting rights context. Those differences are: (1) the Voting Rights Act mandates that states give effect to minority voting strength, while other types of racial preferences to which strict scrutiny is applied do not have such Congressional approval, (2) voting is sacrosanct to the stability and legitimacy of our method of government, (3) the remedy that the Voting Rights Act provides is felt first-hand by those who have been discriminated against by the voting schemes the Voting Rights Acts seeks to change, and (4) attempting to even out minority voting strength to proportionate levels does not inherently take away from another racial group like naked preferences do in other contexts involving racial set-asides or preferences.[50]

The first of the inherent difficulties enumerated by the panel was identifying the necessary burden of proof. The panel here held that the state need simply offer a "compelling justification" for the use of race in a particular redistricting plan: the plaintiff must then prove that either the justification is not compelling, or that the plan is not narrowly tailored to further the interest.[51] Further, Judge Phillips found that the plaintiff, once the burden of proof has shifted, must also prove that the plan did not serve a remedial purpose or had the effect of violating Equal Protection rights.[52]

The second difficulty in applying the strict scrutiny standard is identifying the compelling state interest. Judge Phillips first distinguished that the issue at hand was not whether North Carolina had a compelling interest in enacting this particular redistricting plan, as the plaintiffs in this case suggested, but whether North Carolina had a compelling interest to enact any race-based redistricting plan.[53] The panel then exam-

48. *Id.*
49. *Id.* at 433 n. 20.
50. *Id.* at 434-35.
51. *Id.* at 436.
52. *Id.*
53. *Id.* at 437.

ined the two interests offered by the state: compliance with the Voting Rights Act and "eradicati[on of] the effects of past and present racial discrimination in North Carolina's political processes."[54]

The panel found that a state does have a compelling interest in compliance with the Voting Rights Act. The test that the panel used was that a state has a compelling interest in drawing districts based on race if the state has a "strong basis in evidence" that such districting is "necessary to prevent its electoral districting scheme from violating the Voting Rights Act."[55] The panel added that there is nothing in the *Shaw I* decision that indicates that a state does not have a compelling interest in complying with the Voting Rights Act.[56] A state has a "strong basis in evidence" to engage in racial redistricting when it has "information sufficient to support a prima facie showing" that the state would otherwise be in violation of the Voting Rights Act.[57]

The panel found that there are at least two instances where a state would have the requisite "strong basis in evidence" for a race-based plan. The first is if the state determines that a relevant minority group passes the *Gingles* test, and that there may be a Section 2 violation.[58] The second is if a state is subject to Section 5 of the Voting Rights Act,[59] and a previous plan is objected to by the Attorney General for failure to pay attention to minority voting strength, or a denial of declaratory relief by the District Court for the District of Columbia.[60] The panel also held that the state has a compelling interest to "eradicate the effects of past or present racial discrimination in its political processes, even when it has no basis for believing that the Voting Rights Act requires it to do so."[61] Again, the state must have a "strong basis in evidence" that redistricting based on race is necessary to remedy such past discriminatory practices.[62]

The third difficulty is determining if the plan is narrowly tailored. The panel enumerated five factors that the Supreme Court has looked to in determining whether race-based affirmative action programs are narrowly tailored: (1) "the efficacy of alternative remedies," (2) "whether the program imposes a rigid racial 'quota' or just a flexible racial goal," (3) "the planned duration of the program," (4) "the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates," and (5) "the impact of the program on the rights of innocent third parties."[63]

The panel pointed out that these factors should be easy to apply to voting rights cases. Judge Phillips went on to explain the impact that each of these factors would have on racial redistricting plans. The first factor would require states to ensure that

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54. *Id.*
55. *Id.*
56. *Id.* at 438.
57. *Id.* at 439.
58. *Id.* at 440.
59. It is important to remember here the two pronged analysis that §5 of the Voting Rights Act provides: the effect prong and the purpose prong. Failure to preclear on the basis of either of the two prongs, in the district court's eyes, gives a "sufficient basis in evidence." *Id.* at 442.
60. *Id* at 441.
61. *Id.* at 443.
62. *Id.*
63. *Id.* at 445.

the proposed redistricting plan not go farther than is necessary to further a state interest in using race as a factor.[64] The second factor would require states to recognize the difference between guaranteeing results and increasing minority participation proportional to their percentage of the overall number of voters. The former would be an improper racial quota, the latter, a permissible flexible goal.[65] The third factor requires states to enact a measure that prescribes a period after which the plan must be reevaluated to ensure that it does not outlive its usefulness.[66] The fourth factor requires the state to ensure that the number of majority-minority districts corresponds with the percentage of the minority group compared to the entire voting public.[67] The fifth factor requires that the state cannot unduly impose on the rights of third parties. The panel held that this factor would be violated if the state's plan was not narrowly tailored, if it violated the one person-one vote doctrine, or if it served to dilute minority voting strength. The panel here, however, refused to hold that a burden is placed on third parties if the state does not rely on traditional districting notions of compactness and respect for political subdivisions. The panel insisted, as did the majority in *Shaw I*, that these notions are not constitutional requirements for drawing districts.[68]

The panel insisted that the proper reading of *Shaw I* is that rational districting principles need be used only to ensure that the redistricting plan maintain "fair and effective representation to all citizens."[69] Therefore, a state could deviate from rational districting principles and still have a plan considered to be narrowly tailored, as long as it is necessary to further the state's compelling interest for drawing district lines based on race.[70] Judge Phillips argued that the Supreme Court would never adopt a definition of narrowly tailored in the voting rights area that required the use of traditional districting principles of compactness, contiguity and respect for political subdivisions. He gave three reasons for this argument. First, he argued that those principles do not ensure that districts will be drawn any more fairly than if they are not used. In fact, he stated, modern technology has made those principles even less important by allowing representatives to have closer contact with his or her constituents without having to ensure close proximity.[71] Second, Judge Phillips explained that there is no "judicially manageable standard" to determine if a plan that does not use those principles varies beyond what is reasonably necessary to effectuate the state's purpose for using race in redistricting.[72] Finally, he said, there is no general definition of a compact district simple enough to be judicially manageable.[73]

Judge Phillips's final comment on the narrowly tailored standard, aside from the enumerated difficulties above, was a concern that a restrictive notion of narrowly tailored would result in undesirable levels of judicial involvement in the generally political field of redistricting. If the judiciary interferes too much, reasoned Phillips, then the balance of competing political interests in redistricting legislation would be unduly

64. *Id.* at 445-46.
65. *Id.* at 446.
66. *Id.* at 447.
67. *Id.* at 447-48.
68. *Id.* at 449-50.
69. *Id.* at 450.
70. *Id.* at 451.
71. *Id.*
72. *Id.* at 452 (quoting *Davis v. Bandemer*, 478 U.S. 109, 149 (1985)).
73. *Id.* at 453.

upset. Phillips argued that the *Shaw I* notion of compact and aesthetically pleasing districts simply places an undue burden on states acting within the bounds of a legitimate state purpose.[74]

C. The Dissent

Judge Richard Voorhies filed a dissent disagreeing with the majority in its fundamental reading of *Shaw I*. Specifically, he disagreed with the majority's decision to rule against the findings of the Supreme Court in *Shaw I*. He argued that the majority's disregard for the use of traditional districting principles was blatant ignorance of the express mandate handed down by the Supreme Court.[75] Judge Voorhies said that the majority had a lack of justification in considering the redistricting plan to be constitutional under the strict scrutiny standard.

First, Judge Voorhies found that the redistricting plan did not have sufficient justification because blacks were not sufficiently geographically compact to pass the *Gingles* test under Section 2.[76] Judge Voorhies pointed to the shape of District 12 to evidence that fact.[77] Furthermore, he argued that North Carolina did not have a compelling interest to comply with Section 2 of the Voting Rights Act, since the minority group in question did not pass muster under the *Gingles* test. Judge Voorhies argued that drawing a district so as to bring together a geographically disperse minority group is akin to setting a racial quota of proportional representation.[78]

The Voting Rights Act, according to Judge Voorhies, promises only equal opportunity to participate in the electoral process and does not go so far as to guarantee proportional representation. The panel was attempting to guarantee the opportunity for minorities to elect the candidate of their choice. Judge Voorhies found that to be impermissible and beyond the scope that the Voting Rights Act was intended to have.[79] He argued that the state did not have a compelling interest in complying with Section 5 of the Voting Rights Act. According to Judge Voorhies, the state could not simply use a denial of preclearance from the Attorney General as evidence of a compelling interest. Rather, the state could have presented the plan to the District Court for the District of Columbia to gain preclearance. Judge Voorhies described the revised redistricting plan as illegitimate in that the prior plan may have been precleared with further action on the part of the state.[80]

Finally, Judge Voorhies asserted that the redistricting plan was not narrowly tailored. Voorhies argued that there were less restrictive means available for remedying past wrongs. The plan, as Judge Voorhies described it, went beyond the constitutional scope of the Voting Rights Act, and thus did not pass strict scrutiny.[81] Judge Voorhies said it was the express province of the courts to set the constitutional standards to be used in race-conscious redistricting, rather than have those standards be defined by the political process.[82]

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74. *Id.* at 453-54.
75. *Id.* at 479.
76. *Id.* at 482.
77. *Id.*
78. *Id.* at 483.
79. *Id.* at 485.
80. *Id.* at 486-87.
81. *Id.* at 492-93.
82. *Id.* at 495.

V. *MILLER V. JOHNSON*: GEORGIA ENTERS THE FRAY

In 1995, the Supreme Court handed down a decision in *Miller v. Johnson*[83], a voting rights case from Georgia with facts akin to those in *Shaw I*. Georgia was named a covered jurisdiction under the Voting Rights Act in 1965. This meant, as it did to the counties in question in North Carolina, that the state had to gain preclearance of any redistricting plan either by the Attorney General or by the District Court for the District of Columbia.[84] The 1990 census showed that Georgia was entitled to an eleventh congressional seat, pursuant to which the Georgia General Assembly instituted a redistricting plan to establish the new district.[85]

The first redistricting plan that the General Assembly drew in 1991 provided for two majority-minority districts—the Fifth and the Eleventh—and a third in which blacks comprised 35% of the voting population.[86] The Attorney General objected to this plan, stating that the plan did not "recognize" certain minority groups by giving them their own majority-minority districts.[87] The state then presented a second plan, still with two majority-minority districts, which increased the minority population in the two majority-minority districts and the Second district, which had a 35% black population. The Attorney General again objected to the plan, insisting that a third majority-minority district be drawn. The Attorney General had been swayed by evidence of an alternative redistricting plan called the "max-black" plan, drawn primarily by the American Civil Liberties Union, which created three black-majority districts.[88]

Instead of seeking a declaratory judgment from the District Court for the District of Columbia, the General Assembly used the "max-black" plan as a guideline in drawing the third and final plan. Elections under this new plan resulted in the election of black Congressmen from each of the three majority-minority districts. In 1994, five white voters from the new black-majority Eleventh District sued, arguing that the redistricting plan was a racial gerrymander under *Shaw I*.[89] The District Court for the Southern District of Georgia held the plan unconstitutional under *Shaw I*, stating that, while pursuant to the state's compelling interest in compliance with the Voting Rights Act, it was not narrowly tailored insofar as it found that three majority-minority districts were more than was necessary.

The majority opinion, written by Justice Kennedy, clarified the proper scope and meaning of the Supreme Court's ruling in *Shaw I* and applied it to this case. First, Kennedy held that the appellants misconstrued the holding in *Shaw I*. The appellants' argument was that a plaintiff, when alleging an improper racial gerrymander, must prove that a district is so bizarrely drawn as to have no other explanation other than race in order to state a winning claim.[90] Justice Kennedy stated that the proper reading of *Shaw I* is that shape is not an element of a claim of unconstitutional racial gerrymandering, but is simply circumstantial indicia that race was a motivating factor in drawing district lines. Further, *Shaw I* mandated the application of strict scrutiny not

83. 115 S.Ct. 2475 (1995).
84. *Id.* at 2483.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 2484-85.
90. *Id.* at 2485.

only on redistricting plans that expressly classify on the basis of race, but also those that are facially race-neutral but motivated by racial considerations.[91]

Before discussing the proper requirements of proof under *Shaw I*, Justice Kennedy expressed his feeling that redistricting is properly left to the state legislatures until a plaintiff can adequately prove that improper methods were used. Otherwise, Justice Kennedy argued that the legislatures are the best forum in which to balance competing political interests.[92] From that Justice Kennedy crystallized the burden of proof that *Shaw I* mandated:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial consideration. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."[93]

Justice Kennedy further stated that these principles should guide courts in determining whether or not to intrude on an otherwise legislative process.[94]

Since the state's plan did not overcome this burden of proof, then the plan must survive strict scrutiny. In applying strict scrutiny, Justice Kennedy argued that attempting to gain preclearance from the Attorney General is not the same as complying with the Voting Rights Act, unless it required the action under its express provisions.[95] Justice Kennedy speculated that if the Court were to allow attempting to gain preclearance as a compelling interest, then "we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action."[96] A lower court must make their own determination of the true meaning of the Voting Rights Act, and not defer to the view of the Attorney General.[97]

The Court objected to using the issue of preclearance as a compelling interest because the Attorney General was pursuing ends not prescribed by the Voting Rights Act. Justice Kennedy wrote that the Attorney General was not concerned with whether the plan discriminated in violation of the Constitution, but rather in maximizing minority voting strength. This, according to the Court, went beyond the scope of the Voting Rights Act, and the state lost its compelling interest.[98] The Court sent the case back to the District Court on remand for further proceedings consistent with its decision.

Justice Ginsburg, in her dissent, stated that there were four points on which there was agreement on the Court: 1) that redistricting is best left to the state and warrants limited judicial intervention; 2) that the right of franchise has not been equally enjoyed

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91. *Id.* at 2485-87.
92. *Id.* at 2488.
93. *Id.* (quoting *Shaw v. Reno*, 509 U.S. at 647 (1993)).
94. *Id.*
95. *Id.* at 2491.
96. *Id.*
97. *Id.*
98. *Id.* at 2492.

by blacks as has been for whites in our country's history; 3) that state legislatures sometimes have to consider race in redistricting to meet certain statutory requirements, and 4) that state legislatures may group certain ethnic or racial groups in the same district because they share certain common interests.[99]

Justice Ginsburg argued that the main point of discussion is simply whether Georgia improperly used race in drawing its district lines. Justice Ginsburg argued that Georgia did indeed use traditional districting principles in attempting to group people together with common backgrounds and experiences. Furthermore, Georgia could have asked for declaratory relief in the District Court for the District of Columbia, but instead attempted to meet the criteria set out by the Attorney General. Because of this, the state's plan should remain intact as a genuine attempt to comply with the law.[100]

Essentially, Justice Ginsburg argued that attempting to meet preclearance standards serves as a compelling interest. Justice Ginsburg ended her dissent by offering two pieces of advice to courts and lawmakers. First, it is impossible to think of redistricting as treating people as individuals. When states draw districts, they do not use the same standards as when making personal decisions like in hiring or contracting, and must not be held to the same constitutional standards to which those decisions are held.[101] Second, the Court's holding opens the floodgate for voting rights litigation by allowing suits to be brought if traditional districting principles are not given the same weight as racial considerations, even if the latter is more pressing. In doing so, said Ginsburg, the Court made the assurance of legality in redistricting rest solely on the outcome of litigation, and took redistricting out of the political context and into the judicial sphere.[102]

VI. *SHAW V. HUNT*: THIRD TIME'S THE CHARM

Shaw v. Hunt[103] represents the Supreme Court's final response to the North Carolina redistricting plan initially decided upon in *Shaw I*. However, two things happened between the panel's remand decision and the case here. First, the *Miller* decision was handed down, setting further restrictions on racial redistricting and clarifying *Shaw I*. Second, the Court had decided *Louisiana v. Hays*.[104] In *Hays*, the Court determined the proper threshold for standing in racial redistricting cases. The Court held that the plaintiff must either a) reside in a district that is an alleged racial gerrymander, or b) show that he or she was subject to a racial classification even though he or she lives outside a district considered to be a racial gerrymander.[105]

Justice Rehnquist, in the majority opinion, rejected the decision of the panel. First, the Court resolved a question of standing. Of the five plaintiffs, only two lived in a district affected by the racial gerrymander—in this case, the Twelfth District. The other three plaintiffs did not live in the First District, nor did they show evidence that the alleged racial gerrymander affected their own voting rights. Thus, those plaintiffs were denied standing and the suit was focused on the constitutional legitimacy of

99. *Id.* at 2500.
100. *Id.* at 2504.
101. *Id.* at 2506.
102. *Id.* at 2507.
103. 116 S.Ct. 1894 (1996) (hereinafter *Shaw v. Hunt*).
104. 115 S.Ct. 2431 (1995) (hereinafter *Hays*).
105. *Id.* at 2436-37.

District Twelve.[106]

North Carolina offered three interests to support the drawing of the District Twelve: (1) "to eradicate the effects of past and present discrimination,"; (2) "to comply with §5 of the Voting Rights Act,"; and (3) "to comply with §2 of the Voting Rights Act."[107] The Court made separate consideration of each of these. On the first point, the Court simply argued that under precedent the state had to point to specific instances of past discrimination that needed remedy, and the state did not do so.[108] Next, the Court moved on to the larger issue of compliance with the Voting Rights Act.

The Court's statement on the compliance issue was this:

> " . . . [W]e find that creating an additional majority-black district was not required under a correct reading of §5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding §2 liability."[109]

The Court said that under their decision in *Miller*, the state cannot violate Section 5 of the Voting Rights Act unless the redistricting plan discriminates to the point of violating the Constitution. Further, the Court stated that the Attorney General cannot refuse to preclear a plan because a state relies on other districting principles instead of attempting to maximize minority voting strength. The Attorney General in both this case and in *Miller* followed a program of maximization not prescribed under Section 5 of the Voting Rights Act.[110]

As for the state's other argument that a second majority-minority district had to be drawn to avoid liability under Section 2 of the Voting Rights Act, the Court did not directly refute this argument. Instead, the Court stated that, assuming that Section 2 compliance was a compelling interest, and assuming that the state had strong basis in evidence that a second majority-minority district was needed to escape Section 2 liability, District Twelve was still not narrowly tailored to achieve that end.[111] The Court stated that though the exact definition of narrowly tailored is hazy, one could nevertheless see by looking at District Twelve that the population covered by the district was not "geographically compact," failing the *Gingles* test for a Section 2 violation. The state lost its argument that the plan was narrowly tailored, and failed strict scrutiny.[112]

North Carolina contended that if a state had a strong basis in evidence that there could exist a Section 2 violation in the state, then the state could draw a new majority-minority district anywhere in the state. The Court rejected this argument as well. If the state was allowed to do this, then the district would not remedy the alleged vote dilution in the area it was thought to exist. Rather, the remedy would be extended to the race as a whole and not the individuals involved. The right to vote, the Court explained, belongs to the individual, not the race. That being said, the Court reversed the judgment of the panel, and ruled that District Twelve was unconstitutional.[113]

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106. *Shaw v. Hunt* at 1900.
107. *Id.* at 1902.
108. *Id.* at 1902-03.
109. *Id.* at 1903.
110. *Id.* at 1904.
111. *Id.* at 1905.
112. *Id.* at 1905-06.
113. *Id.* at 1906-07.

In his dissent, Justice Stevens made several points. First, Justice Stevens opined that the majority's insistence that federal judges would not be able to discern racially neutral districting principles from pretextual ones is false. He argued that the record showed that North Carolina drew a second majority-minority district to keep from violating the Voting Rights Act, and could not help but make race an overriding concern. Further, the evidence that other interests may have led to the shape of the Twelfth District should override the supposition that the bizarre shape could only be explained by race. In fact, Justice Stevens argued that there was evidence that other concerns did explain the shape of the district, and that race was only one of those concerns. It would have been better, in his view, if the Court had remanded the case back to the panel to apply the *Miller* standard.[114]

Justice Stevens explained that the state had a compelling interest not only in remedying past discrimination, but also in avoiding the litigation that would have been necessary to overcome the Attorney General's objection to the proposed plan. He argued that it makes no sense that a state must formulate a plan with a remedial purpose if the intent is only to avoid litigation. In sum, Justice Stevens stated that the proposed plan showed both a compelling interest in protecting incumbents, preserving communities of interest and avoiding litigation, and the plan was narrowly tailored to accomplish those goals.[115]

VII. *BUSH V. VERA*: *SHAW* VISITS TEXAS

On the same day that *Shaw v. Hunt* was decided, the Court also handed down a ruling on a Texas case dealing with a similar racial gerrymander. *Bush v. Vera*[116] also arose out of changes from the 1990 Census. It was established that Texas would gain an additional three congressional seats, and, accordingly, the Texas Legislature enacted a new redistricting plan. In this case, the state created two new majority-minority districts: District 30, a black-majority district, and District 29, an Hispanic majority district. It also redrew District 18 to make it a black-majority district. The Attorney General precleared the redistricting plan, and the plan was used in the 1992 elections.[117]

The six plaintiffs challenged 24 of 30 districts, asserting that those districts were impermissible racial gerrymanders. The District Court ruled that only Districts 18, 29 and 30 were unconstitutional gerrymanders under the standards elucidated in *Shaw I*.[118] The Supreme Court agreed that those districts warranted the application of strict scrutiny, and held that the districts were not narrowly tailored to pass the strict scrutiny test. The majority opinion was written by Justice O'Connor. The Court first decided whether the application of strict scrutiny to Districts 18, 29 and 30 was warranted. The Court reiterated the basic holding from *Miller* that a plaintiff must prove that legitimate redistricting principles were "subordinated" to race.[119] The Court acknowledged, however, that this case was different than those previously decided. Although the state of Texas stipulated that they used race as a factor in drawing district lines, the Texas

114. *Id.* at 1915-17.
115. *Id.* at 1920-22.
116. 116 S. Ct. 1941 (1996).
117. *Id.* at 1950-51.
118. *Id.* at 1951.
119. *Id.*

Legislature also based its decision on other, more traditional, districting principles, especially incumbent protection. As such, the record did not indicate that district lines were drawn solely on the basis of race, but rather with race in mind.[120]

At trial, the District Court found that Texas usually abided by traditional districting principles, and that the Legislature had indeed committed itself to maximizing voting opportunity from the outset.[121] The Supreme Court found this, and the districting methods the Legislature used to drawing new districts, to be persuasive in deciding to apply strict scrutiny. The Legislature used a computer data program called "REDAPPL", which allowed the Legislature to upload the racial makeup of Texas on a block-by-block basis; this was added to other demographic data that was only available by voting precinct.[122] In other words, the precision with which the Legislature could view racial data probably explained the ultimate shape of the districts. However, there was evidence that incumbent protection may have been a determinant factor as well. In the 1992 elections, the first time the new districting plan, only one of the 27 incumbents up for reelection lost.[123] Further, Districts 18 and 29 seemed to follow county lines, and were drawn with a major city at the center and spreading into outlying areas.[124] None of the districts had the dispersed characteristics of the North Carolina districts in *Shaw I*.[125]

Despite Texas' assertion that other districting principles played as much a role in the redistricting process as race, the Supreme Court looked at each district separately to decide the appropriateness of applying strict scrutiny. The first was District 30. District 30 was a 50% black and 17% Hispanic district with its core located in southern Dallas and extending out in seven arms to the suburbs, collecting pockets of minority voters. Texas agreed that traditional districting principles like compactness were not followed, but argued that the shape of the district was largely attributed to incumbent protection and the desire to unite certain communities of interest around Dallas into one district.[126]

The Court, however, said it found nothing from the facts at trial to overturn the District Court's ruling that race was the predominant factor in the redistricting plan. The Court pointed to two facts: (1) the state did not have any evidence or data about whether communities of shared interests even existed and (2) the decision to draw districts based on race was made before any data was compiled on whether communities of shared interest existed.[127] The Court said it had a more difficult time with the incumbent protection argument, but dispensed with that justification as well. The Court stated that incumbent protection, as opposed to race, could better explain the decision to ignore traditional districting principles. However, the Court found that District 30 was drawn using race as a proxy for a political gerrymander. The Court supported the District Court's findings that race was the predominant factor in drawing the district's lines and that any political foundation for the district was established by the use of

120. *Id.* at 1952.
121. *Id.* at 1952-53.
122. *Id.* at 1953.
123. *Id.* at 1954.
124. The two districts are adjoining, and are located in and around the Houston metropolitan area.
125. *Id.* at 1953-54.
126. *Id.* at 1954-55.
127. *Id.* at 1955.

race by proxy.[128]

Lastly, the Court found that District 30 provided prima facie evidence of the use of race in drawing the district combined with the use of the REDAPPL program in drawing the redistricting plan.[129] With this evidence, the Court sustained the District Court's holding that District 30's shape was "unexplainable in terms other than race."[130] The Court found that, while the use of race was intertwined with other complex decisions based on other principles, race was the predominant factor, and made District 30 warrant strict scrutiny.[131]

With regard to Districts 18 and 29, the Court's holding was more blunt. The Court stated that the two districts were not only bizarrely-shaped, but also clearly showed "utter disregard of city limits, local election precincts, and voter tabulation lines."[132] The state again noted that the main focus of the redistricting plan was incumbent protection. However, the Court explained that the bizarre shape of the districts, like in *Shaw I*, showed that race overcame any other concerns that may have been a part of the redistricting process. The Court also pointed to the state's submission for preclearance to the Attorney General as evidence of the state's intent to maximize minority voting strength proving that race was the overriding concern going into the process. These factors led the Court to hold that strict scrutiny applied to all three districts.[133]

After finding that strict scrutiny applied to all three districts, the Court began their determination of whether the districts were narrowly tailored to serve a compelling state interest. The state provided three compelling interests: "the interest in avoiding liability under the 'results' test of VRA §2(b), the interest in remedying past and present racial discrimination, and the 'nonretrogression' principle of VRA §5 (for District 18 only)."[134] The Court proceeded to analyze each proffered interest separately.

Justice O'Connor, in the majority opinion, stated that the Court assumes that compliance with the results test of Section 2 can be a compelling state interest. The Court also permits a certain amount of leeway under the narrowly tailored analysis to further that interest. If a state draws a "reasonably compact" district, it may pass strict scrutiny without showing that it is better than alternative districts submitted to the Court by parties alleging injury. The problem arises when states use race as an overriding factor in the redistricting process. The Court stated that Texas' three districts passed the second and third *Gingles* tests for Section 2, but argued that the minority communities in question were not sufficiently compact to warrant the districts drawn. The Court stated that Section 2 does not require a state to draw a bizarrely shaped district, since it requires the minority population for which the district was drawn to be geographically compact. If a reasonably compact district cannot be drawn, then Section 2 does not require it to be drawn. Thus, the state went beyond what Section 2 provides and lost that as a compelling interest.[135]

Justice O'Connor also pointed out that the *Miller* decision should not be read as

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128. *Id.* at 1955-56.
129. *Id.* at 1957.
130. *Id.* at 1958.
131. *Id.*
132. *Id.* at 1959.
133. *Id.* at 1959-60.
134. *Id.* at 1960.
135. *Id.* at 1960-62.

requiring bizarre shape to trigger strict scrutiny. Rather, she explained that the presence of a bizarrely shaped district is circumstantial evidence of an unjustified racial classification, which is the essential constitutional harm to be remedied. The harm that bizarrely shaped districts inflict, according to Justice O'Connor, is the impression that the "political identity" of the district is based solely on race created by the non-presence of traditional districting principles.[136]

The Court then analyzed Texas' proposed interest in remedying the effects of past and present racial discrimination. Texas argued on appeal that the predominant harm to be redressed was vote dilution caused by invidious and longstanding discriminatory practices. The Court stated that this argument was the same one Texas gave for its compliance with Section 2 of the Voting Rights Act. In *Shaw I*, the Court held that a state must use sound districting principles and have a geographically compact racial minority in order for this interest to be considered compelling. The Court explained that under this standard, the remedial purposes argument is subsumed by the Section 2 defense, and that the Court previously ruled that the districts were not narrowly tailored.[137]

The state also attempted to justify its redistricting plan by arguing that District 18 was drawn in order to comply with Section 5. Justice O'Connor drew a distinction between maintaining the proportion of minority voters in each district to their percentage of the overall voting population and increasing that percentage in a particular district. O'Connor interpreted the nonretrogression provisions under Section 5 to mandate that the state cannot diminish, either directly or indirectly, the opportunity of minorities to elect the candidate of their choice. O'Connor argued that the nonretrogression principle does not mean that a state can take whatever action it deems necessary to preserve or create a certain outcome. The Court held in *Shaw I* that a redistricting plan would not be considered narrowly tailored if it did more than was "reasonably necessary to avoid retrogression."[138] The Court determined that the Texas Legislature went beyond what was reasonably necessary, and that the districts were not narrowly tailored.[139]

Justice O'Connor concluded by stating that the Court was aware of the complexity inherent in the redistricting process, and that absolute rules governing the process are impossible to create. Justice O'Connor expressed the majority's desire to let the redistricting question remain the province of the state legislatures, and to let courts play a role only when the Constitution is violated. The majority further expressed its hope that the recent cases on voting rights will serve as a guide to the rough constitutional boundaries that the states must honor in drawing districts. Finally, the Court appealed to the states to use caution in ensuring that districts are drawn fairly and according to accepted principles. In doing so, the Court said it wanted to honor its "commitment" to keep government from using racial stereotypes in lawmaking.[140]

Justice Stevens, in his dissent, said the existence of District 6 makes it less certain that race was the dominant factor over incumbent protection. Justice Stevens found the facts at trial indicated that the Texas Legislature was concerned about race to the

136. *Id.* at 1962.
137. *Id.* at 1962-63.
138. *Id.* at 1963.
139. *Id.*
140. *Id.* at 1963-64.

extent necessary to comply with the Voting Rights Act. The Legislature was more concerned, speculated Justice Stevens, about incumbency protection. He argued that this evidence was discounted by both the District Court and the majority of the Supreme Court because neither liked that justification. Instead, the evidence of incumbent protection needed to be looked at with the rest of the evidence at hand, and Justice Stevens accused the Court of failing to do so.[141]

Justice Stevens said that the bizarre shape of District 30 in particular was an indication of a complex and multi-faceted redistricting plan than one solely determined by racial interests. Instead, Stevens contended that race was used as a proxy for political purposes only to fine-tune the district's shape. Justice Stevens posited that a reasonable reading of the facts would show that District 30 was drawn more in line with political considerations than to purely maximize minority voting strength.[142]

Justice Stevens drew two conclusions from the facts of the case: first, the Texas Legislature had a compelling interest in complying with the Voting Rights Act and the plan was narrowly tailored as it only went so far as to ensure compliance;[143] second, redistricting is best left to state legislatures. By disregarding the complexity of the redistricting process, as Justice Stevens argued the majority did, the Court showed a disregard for the state legislature. Finally, he argued that it is dangerous to put state legislatures on the defensive, because too many restrictions on the process may lead states to choose not to follow the Voting Rights Act at all.[144]

In his dissent, Justice Souter predicted that *Shaw I* would result in a confusion that the Court has had opportunity to clear up, but has not.[145] Justice Souter argued that the Court failed to do two things: one, to define the necessary harm needed to bring a claim under the new racial gerrymander cases; and two, to define a judicially manageable standard for the districting principles that are allowed to be used.[146] The "predominant factor" and "in substantial disregard for customary and traditional districting practices" standards articulated by the Court in previous cases, Justice Souter said, are insufficient. Because race can be such a large influence in elections themselves, Souter argued that it cannot be separated from traditional districting principles.[147] If these continue to be the "standards" that the Court applies in redistricting litigation, then there will be no incentive for states to take substantial action to avoid minority vote dilution. The Court essentially told the states, said Justice Souter, that there is a small tolerance for error. If this continues, counsels Justice Souter, then there will be too much confusion for rational action, and the states will simply opt for inaction instead.[148]

VIII. WHAT TO DO, WHAT TO DO?

Since North Carolina and Texas both planned to use their new redistricting plans for the 1996 elections, there was a scramble in both states to determine which districts to use in place of the proposed districts that were struck down by the Supreme Court.

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141. *Id.* at 1984-86.
142. *Id.* at 1987-89.
143. *Id.* at 1989.
144. *Id.* at 1990-92.
145. *Id.* at 1998.
146. *Id.* at 2003-04.
147. *Id.* at 2005.
148. *Id.* at 2009.

In North Carolina, the three judge panel that decided *Shaw v. Hunt* ruled that the plan struck down by the Supreme Court would be used for the 1996 elections, and that the General Assembly would be required to draw new districts by April 1, 1997, in time for the 1998 elections.[149] The panel explained that the cost to the taxpayers of holding new primaries would be too great a burden and that the shape of the Twelfth District was such that to redraw it would require all the surrounding districts to be redrawn.[150] The ruling was appealed to the Supreme Court, and the Court affirmed.[151]

In June, 1996, immediately after the Court's holding in *Bush v. Vera*, Texas Governor George W. Bush, a Republican, stated that he wanted new districts drawn before the November 1996 elections. He did not, however, call a special session of the legislature to do this. Rather, he hoped that the parties to the lawsuit could reach a settlement.[152] There were irreconcilable differences between what the state wanted and what the plaintiffs wanted. The plaintiffs looked to have 26 of the state's 30 districts redrawn, while the state wanted only districts redrawn. Furthermore, the state and the Department of Justice asked that the task be delayed until 1998 so that the Texas Legislature, rather than the court, could redistrict.[153]

The only way the legislature would have the chance to redistrict, according to the three-judge panel assigned to decide this case, was if the Governor called a special session. The Governor could either let the Democrat-controlled Legislature draw the new districts or let a more conservative judicial panel make the decision. In fact, two of the judges on the panel were Reagan appointees, and the other was appointed by the Governor's father.[154] Based on this, Governor Bush did not call a special session and left redistricting to the court.

No settlement was reached, and the panel, after reviewing suggested plans submitted by both Democrats and Republicans, redrew the districts surrounding Houston and Dallas. These 13 new districts will vote in an open election. This means that the results of the party primaries will be disregarded, and thus anyone can run as a candidate in those districts. There will be no straight-party voting, and if a candidate does not receive a clear majority in the November election, a run-off will be held on December 10.[155] Further, the court ordered the Legislature to enact a new redistricting plan during its 1997 term, to be used in the 1998 elections.[156] The order was challenged by the NAACP Legal Defense and Education Fund and Democrats, but the Supreme Court rejected their last-minute appeal, letting the new districts stand.[157]

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149. Foon Rhee, *Ruling Lets N.C. District Lines Stand For '96 Elections*, CHAR. OBSVR., July 31, 1996, at 1A.

150. *Id.*

151. 3 Foon Rhee, *Top Court Says Vote Can Proceed: Congressional Districts Won't Be Redrawn Before November Election*, CHAR. OBSVR., Aug. 22, 1996, at 1C.

152. R.A. Dyer and R.G. Ratcliffe, *Bush Wants New District Lines Soon*, HOUS. CHRON., June 17, 1996, at A11.

153. Alan Bernstein, *Judges Warn They May Draw District Lines*, HOUS. CHRON., July 12, 1996, at A1.

154. Alan Bernstein, *Politics Send Court to the Drawing Board*, HOUS. CHRON., July 13, 1996, at A30.

155. Alan Bernstein, *Judges Shift District Lines*, HOUS. CHRON., August 7, 1996, at A1.

156. Michael Holmes, *Redistricting Looms in '97 for Legislature*, HOUS. CHRON., Aug. 9, 1996, at A33.

157. Alan Bernstein, *High Court Rejects Appeal on Redistricting in Texas*, HOUS. CHRON., Sept. 5, 1996, at A1.

IX. REDISTRICTING: THEORY AND PRACTICE

As it stands today, the Supreme Court's recent decisions on the validity of certain racial gerrymanders leave open a number of issues that will have a lasting effect on the future of redistricting. This section discusses some of the effects these cases will have and examines the proper role of the Court in redistricting issues. This list of effects is by no means exhaustive, but they are the main issues facing state legislatures in the aftermath of the Court's rulings.

A. Standing

The Court's position on the standing necessary to bring a claim of improper racial gerrymandering is the starting point of the confusion surrounding the current voting rights cases. After *Hays*, *Shaw I* and *Miller*, the Court has essentially allowed a plaintiff who has not suffered a cognizable injury to sue under a claim of improper racial gerrymandering. *Shaw I* and *Miller* accord standing to individuals who claim they are injured by racial integration—or at least racial integration in which whites do not remain the predominant group."[158] The Court now allows anyone who is placed in a district which may have been the product of a racial gerrymander to sue, along with those whose voting power was actually affected. Moreover, all these districts were challenged before any elections took place with the new districts in force. The basis of the claim is not that there was an actual injury, but that there existed the probability that an injury would occur with the districts as they were drawn. The voters who bring these suits are concerned with the same problem that these districts are drawn to resolve: inadequate representation. Vote dilution claims rest on the belief that the affected voter does not have the ability to meaningfully elect the representative of his or her choice. Just as this is the fear of minority voters in a white-majority district, so too is it the fear of white voters in a majority-minority district.

When the Supreme Court stated in *Shaw I* that minority voters are represented as well as the majority voters in a district, it gave credence to the arguments of the white voters that they had been victim to racial classification, at the same time discounting minority voting strength claims. If the Court believes that minority voters have equal access to the political process in a white majority district, then the Court should have no problem with white voters being the minority in a majority-minority district, as the whites would have the same access to the political process. It is as Professor Pamela Karlan said: it is essentially the integration of white voters into a majority-minority district that is being remedied, not the representational harm.

In effect, the Court is not attempting to remedy a particular harm, but is rather using these cases to oversee this part of the political system. The standing requirements are simply ensuring the ability of courts to review, case by case, the product of the state legislatures. It is now evident that in cases of racial gerrymandering, it is more likely than not that a suit will be filed when there is a scintilla of evidence that race was a motivating factor in drawing districts. In placing itself in such a supervisory role, the Court has imprudently taken the judiciary into an area in which political forces do and should play the dominant role.

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158. Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 293 (1995-96).

B. Three Conceptions of the Right to Vote

Before discussing the proper role of the judiciary in redistricting claims, there is a theory of the role of voting in the political process that merits debate. Professor Karlan's theory[159] on the conception of the right to vote contends that there are three levels of impact that voting has on the political process. The first level is voting as participation. This level simply holds that a person has the right to cast a vote that is counted. Karlan sees this level as the essence of "civic inclusion"[160] that by voting a person becomes part of a larger community, and is able to "participate fully in community governance by casting a ballot."[161] This level of voting is seen in the earliest voting rights cases, where the Court struck down poll taxes and literacy tests as prerequisites to voting. However, according to Karlan, this level also assumes that the right to participate will conform to the voting procedures already in place, such as the ability to vote only for those names on the ballot and registration regulations.[162]

The second level is voting as aggregation. At this level, voting is not simply to define the system of governance in a community, but is instead the aggregation of individual votes to reach a collective decision. Thus, claims brought under the aggregation theory are generally either claims by individuals that they are part of a discrete group of voters whose collective voice is being ignored, or are brought by the group itself. Karlan explains that this theory perpetuates two types of claims: those claims that argue that the minority has been placed in a district in which their voice is overwhelmed by the majority, like vote dilution or racial gerrymanders, and those claims that argue that structural rules within the voting system have diluted the voice of a discrete class of voters.[163]

The problem at this level, according to Karlan, is that the Court has decided these cases without a firm baseline of what the results of a fair aggregation of voters would be. Karlan explains that the second level of analysis has a results-based component, in that the claims brought under this level assert that the dilution of a group's voting strength will have the effect of denying that group the ability to effectively elect the candidate of their choice. Without a firm baseline for what results would be fair under this level of analysis, the Court instead proposed that vote dilution claims do not have to prove that the voter or aggregate of voters was unable to elect the candidate of their choice, but that voters have been altogether cut off from the political process.[164] Karlan identifies the legal question at the aggregate level as this: "[T]he critical question for an individual cannot simply be whether she can elect her preferred candidate. Rather, it must focus on whether the system for selecting the entire governmental body gives her an effective opportunity to participate in policymaking."[165]

The third level of analysis is voting as governance. This level of analysis shifts the voter's focus from concern as to the voter's own representative to an interest in the overall makeup of the representative body. At this level, voting is not a procedure, but

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159. This theory is outlined in Pamela Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-20 (1993).
160. *Id.* at 1710.
161. *Id.* at 1711.
162. *Id.* at 1712.
163. *Id.* at 1713-14.
164. *Id.* at 1714-16.
165. *Id.* at 1716.

part of an ongoing participatory involvement in policymaking. While election of one's own representative serves the immediate interests of the voter, there is an ancillary, but nonetheless important, interest in ensuring that the voter's representative will have the opportunity to represent his or her constituents in the legislative body. That is, the voter wants not only to have a vote that counts in the aggregate, but also wants to have a representative that counts as well. Claims brought at this level not only concern vote dilution, but also seek to bring the voting strength of the minority-elected representative to a level commensurate with the percentage of the minority group to the whole of the voting public.[166]

Karlan describes her three levels of voting rights as being part of a continuum, with the recent cases decided by the Court located somewhere between the second and third levels. The problem with the Court's analysis of voting rights claims is that the Court has taken an overly simplistic view of the remedies necessary to solve the problem of racial factionalism in voting. Karlan warns that the remedies for voting rights claims must deal with the fact that there still is a large white majority that threatens to overwhelm the voice of minority voters. While the Court must be wary of factionalizing voters based on race, according to Karlan, it must also provide for some assurance that a minority's voice will be heard if the Court truly wants to involve itself in redistricting. Thus, the Court must pay particular attention to the different political cultures of each jurisdiction before applying an overall rule.[167]

C. Theory Meets the Real World

As Professor Karlan duly points out, the process behind redistricting is a complex one, and presents a number of problems to the Court. The Court, though, has entered into an area previously dominated by political currents. As a result, many have called the Court's participation in this area into serious question. With the sole purpose of effectuating change in only one area of this complex issue, this intervention not only places the Court in a precarious position, but it also constrains the states in such a way as to make redistricting exceedingly difficult and potentially unfair.

The Court chose to take an individual-based approach to the redistricting question instead of looking at voting as both an individual and a group activity. Some argue that voting as an individual is irrational, since one single vote among the comparatively vast number of votes cast is inconsequential, but that voting in the aggregate is a rational activity. In *Shaw I*, the Court asserted that in redistricting, people are to be thought of as individuals, not as member of a racial class. However, it is evident that people do vote in the aggregate—voters are as concerned about the entire makeup of the representative body as they are concerned that the candidate they voted for has a chance of being elected.

The Court, in taking the individual approach to voting rights, ignores the individual's interest in being represented in a real manner, not just having a vote in a particular election. The Court states in *Shaw I* that if black voters are placed in a particular district, a message is sent to the representative that they are to cater to the concerns of the black majority in the district. The Court reasoned that it is better for the black population to remain as a strong minority in the district that they are already

166. *Id.* at 1716-19.
167. *Id.* at 1719-40.

in, and that the representative of that district will represent their concerns as vehemently as he or she represents the majority. This is an overly idyllic notion of our representative system. The fact is that elected representatives are interested first and foremost in retaining their position as an elected representative. That means in a nutshell that a representative will represent the interest of the majority bloc that got him or her elected. Taken further, if a minority view conflicts with a majority view, then the majority view will likely prevail. While it is admirable and desirable for the Court to advocate a system of full representation, it simply does not work that way.

If there did exist a system of full representation, there would be no lobbyists at state capitols trying to persuade legislators to draw majority-minority districts. The Texas Legislature would not have received pressure from interest groups if their minority population felt that they were adequately represented by the representatives of the districts they belonged to at the time. Further, those minority groups would not feel shut out of the political system if their main concern was whether they were able to cast a vote at all. Their concern lies in the aggregate; their concern lies in the ability of a representative to be effective in the representative body. It is in that way that Professor Karlan's theory works to show the fallacy of certain assumptions made by the Court.

D. Why The Court Doesn't Belong

While it is important for the Court to ensure that the redistricting process does not unfairly group people into districts based on race, the Court nevertheless must be careful to acknowledge the presence of race in the political process. By adding further complexity to compliance with the Voting Rights Act, the Court took away the incentive states had to engage in voluntary compliance. There are many reasons why the Court should not intrude on the otherwise political process of redistricting. The first reason is that the Court cannot begin to understand the complexity of the political culture in every state. As it was shown in testimony during *Shaw I* and *Bush v. Vera*, there was a balance of many competing interests that led to the final redistricting plan. The Court was not in the position then, and is not now, to determine what the predominant factor was at the time. While state legislators may have indicated that a large concern was minority voting strength, the Court took that to mean that voters were improperly characterized based on their race.

For the Court to say that race should not be used as a predominant factor in redistricting is incredible. The Court again uses an individual approach to the question, arguing that individuals vote, not groups. If that were the case, election strategists could save a lot of money by eliminating demographers. It is undeniable that race plays a factor in elections. More importantly, racial groups in similar economic and social positions have a formidable impact in electoral politics. State legislators, when acting to draw district lines, look at how groups vote in order to draw the district lines that support incumbents and provide a district map which promotes their party. In recent cases, the Court has argued that this is using race by proxy as a means to another goal, and is impermissible; it has conversely argued that a district drawn for purely political reasons is permissible. To separate these two arguments ignores the influence that minority groups in the aggregate have on the political system. It is too simple a view of the political system.

The second reason why the Court should not intrude in redistricting is that the Court has essentially allowed the federal courts to draw districts instead of impressing

the importance of leaving it to the state legislatures. This, combined with the confusion that the new redistricting standards caused, will ultimately lead to the abdication of redistricting duties by state legislatures in favor of letting the federal district court draw districts. This is already happening. When *Miller* was remanded to the District Court, the state asked the court to draw the new district lines instead of the legislature. And, as discussed earlier, the district lines used in the Texas elections in November were drawn by the court because Governor Bush decided that the court's district plan would be better for the Republicans than a plan drawn by the Legislature had a special session been called. In North Carolina, the district court did not draw districts, but instead allowed elections to be held in the unconstitutional districts only until 1997, when new lines are drawn by the General Assembly.

Any abdication of redistricting duties by the state legislatures results in taking redistricting out of the political arena and opening the door for judicial redistricting. As was said before, the judiciary is in no position to make a determination based on the complexity of the political process in each state. The Court, in its series of 5-4 decisions, illustrates the absence of agreement as to how it interprets the appropriateness of districts and how they should be drawn. For instance, Justice White in his dissent in *Shaw I* interpreted the drawing of District 12 as more a product of political concerns than of a district drawn solely with race in mind.[168] This alone shows that there is more than just one interest influencing redistricting. The absence of a judicially manageable standard for drawing districts, in addition to the complexity of issues facing the drawing of district lines, makes it impossible for the courts to take over the role that properly belongs to the state legislatures.

X. CONCLUSION

Redistricting will be difficult in the future because there are now two standards to which redistricting plans are subject to. If those standards are viewed within Karlan's theory, the problem lies in the variety of inconsistent levels of voting analysis used by the Attorney General and in the courts. The Attorney General interpreted voting as an aggregate activity, while the Supreme Court interpreted it as an individual activity. The Voting Rights Act synthesizes these two views. As a whole, the Voting Rights Act was designed to ensure that every American citizen be allowed to enjoy his or her right to vote with minimal hindrances or qualifications. Taken separately, Sections 2 and 5 of the Voting Rights Act are protections of an aggregate right to vote, providing for the protection of minority voting strength and for preclearance in counties that discriminated in the past. An interpretive problem lies in the difference in the nature of the right to vote under the aggregate theory versus the individual theory. The Attorney General, applying the aggregate theory, understands the Voting Rights Act as a tool to protect the rights of blacks as a group. This results in a program of minority voting strength maximization that has caused the Attorney General to deny preclearance to plans. Ultimately, this view will lead to a guarantee of results over a guarantee of opportunity.

The Court, on the other hand, followed the individual theory of voting rights. As such, the Court admonished the Attorney General for denying preclearance and recommending that districts be drawn pursuant to maximization plans. The Court interpreted

168. 509 U.S. at 658-75.

the last sentence of Section 2 to mean that there is no guarantee of results, only a guarantee of opportunity. The Court explained that the maximization program followed by the Attorney General are contrary to the express provisions of the Voting Rights Act. It is the province of Congress to step in and provide some standard or guideline for the Attorney General to follow in the preclearance process. Section 2 of the Voting Rights Act expressly provides that redistricting plans may not deny minority groups either the ability to elect representatives of their choice, or the ability to participate in the political process. The interpretation of this section depends on what one considers to be meaningful participation. Those who subscribe to the individual theory would agree that the ability to cast a vote is sufficient participation. However, those who follow the aggregate theory or the voting as governance theory see participation not only as the right to cast a vote, but also the right to have a representative that reflects the minority group's viewpoint in the legislature. Under these theories, participation is being reasonably able to make some impact in the legislature once elected.

Although the latter may be deemed to be a guarantee of results outside the scope of the Voting Rights Act, it can also be characterized as a greater opportunity that a minority group will have a voice in the representative body. Congress needs to define what it considers to be meaningful participation and to what extent the states and the Attorney General may pursue that end. Further, Congress needs to identify the scope of the Court's authority to oversee the matter. Specifically, Congress must provide guidelines for redistricting when minority voting strength is a concern.

Professor Karlan explained the dispute this way:

> The real friction between the Voting Rights Act and wrongful districting jurisprudence is not doctrinal but pragmatic and institutional. The combination of lax standing requirements, ideological and partisan incentives to sue, and a receptive, activist federal judiciary guarantees that jurisdictions will find themselves walking a tightrope. If they do not draw majority-black districts in most areas with substantial black populations, they will find it difficult to obtain preclearance and, if they do, will face traditional section 2 lawsuits. But if they do draw those districts, they will find themselves embroiled in wrongful districting litigation. There is now no realistic way for a jurisdiction to avoid costly and divisive litigation. It makes sense for the Court to step in when there are individuals or groups being denied their right to participate or to have their votes fairly counted or to have their views taken into account in the legislative process. By contrast, when complainants have suffered no particularized injury, but simply object to the prevailing democratic theory, the Court's intervention is entirely unjustified. 'In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government,' [citation omitted], precisely the kind of question that should be hammered out in the political process.[169]

The problems in this area are threefold: 1) the Court has opened the door to vast amounts of Voting Rights Act litigation by enlarging the standing necessary to make a claim; 2) the Attorney General and the Court have different views on the nature of the right to vote; and 3) the Voting Rights Act does not provide the necessary guidance for either states or the Attorney General to follow in redistricting and preclearance. Congress can rectify the situation by providing a definition for meaningful participa-

169. *Karlan, supra* note 170 at 210.

tion. In doing so, Congress needs to decide if the protected right here is an individual one or an aggregate one. States must then decide if they need to protect the voting rights of each individual member of a minority group or if they need to protect the rights of a group as a whole. Only then can accurate measurements be taken to assure the adequate protection of the right to vote.

Congress also needs to give the Attorney General a standard for review in the preclearance process. If the Attorney General is given guidelines in preclearance, then states will be able to redistrict with adequate knowledge of preclearance necessities. It would add predictability to the system by not only ensuring more effective redistricting legislation, but also eliminating confusion. By defining the scope of the Voting Rights Act more clearly, and by providing a model to follow, Congress can reduce costly litigation. Doing so will also provide better assurance that the rights of minority groups will be protected legitimately and evenly. If changes are not implemented, then we can only expect more of the same.

*Christopher Kukla**

* B.A. Alma College, 1994; Candidate for Juris Doctor, Notre Dame Law School, 1997. I dedicate this note to my mother, Ellen, without whom none of this would be possible, and to my father, Leonard. I also wish to thank Professor William Kelley for his comments and recommendations.